No. 3519

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

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DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,

Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and By FREDERICK E. STEERE, Her Guardian,

Defendant in Error.

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## OPENING BRIEF OF PLAINTIFFS IN ERROR

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### *STATEMENT OF THE CASE.*

On the 24th of May, 1917, Rebecca Houghtailing, plaintiff, through and by Frederick E. Steere, her guardian, filed a bill of complaint in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, against George De La Nux, Jr., and Daniel De La Nux, defendants, for the reformation of a deed

executed by said plaintiff conveying to said defendants a certain piece or parcel of land situate on Kamehameha IV Road, Kalihi, Honolulu, and also her real and personal property wheresoever situate, with the reservation of a life interest to herself in all of said property. It appearing that the defendants were minors at the time the suit was instituted, their father, George F. De La Nux, was appointed their guardian *ad litem*. On the 1st day of December, 1918, while the suit was still pending, George De La Nux, Jr., one of the defendants, died; and this fact being called to the attention of the Court an order was made amending the bill of complaint by adding thereto as defendants the names of the father and mother of the deceased, as the heirs of the said George De La Nux, Jr., and they were thereby made parties defendant to the suit.

It further appears that on the 11th day of April, 1916, the said Rebecca Houghtailing on her own motion was declared a spendthrift within the meaning of the laws of the Territory of Hawaii, and Frederick E. Steere was appointed the guardian of her person and estate; and that he obtained an order of court as such guardian to institute legal proceedings against the defendants for the reformation of the deed aforesaid.

The trial of this cause came on before the Honorable William H. Heen, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on June 16, 17, 18, 19, 20 and 23, A. D. 1919, and at said trial evidence was adduced by Mrs. Hough-

tailing and other witnesses in her behalf to show that for many years (including the time at which she executed the deed in question) she had been a drinking woman, indulging continuously in the use of intoxicating liquors; and she further swore that she never intended to sign the deed in question. It was further proved that the said deed was signed by Rebecca Houghtailing on the 10th day of June, 1905, and acknowledged by her on the 8th day of November, 1905, and that at the time she signed said deed she was of about the age of 49 years. The testimony of the respondents shows that she had for some time prior to her signing said deed, wished to turn over her property to her son, George F. De La Nux, on account of the misconduct of his brothers, and upon his refusing to accept the same she had offered to turn it over to his children; that at various times and in front of various witnesses, after the execution of the deed she had admitted the execution of the same, sometimes expressing her regret and at other times expressing her perfect satisfaction with her act. It further appeared from the testimony of the attorney who drew the deed, A. G. Correa, that Mrs. Houghtailing had called upon him in person and alone and instructed him as to the contents of the deed, and that the deed was read and explained to her before being signed by her.

The Trial Judge decided on the 30th day of June, 1919, that the plaintiff at the time the deed in dispute was executed, was a person addicted to the excessive use of intoxicating liquors and that be-

cause of her habitual intemperance she was unable to attend to business affairs and was easily influenced by her son George; that she was deceived and defrauded by him by being made to believe that the deed conveyed only the Kalihi home; that she succumbed to such deception and fraud because of the trust and confidence she placed in said son. In accordance with said decision a decree was entered in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, dated June 30, 1919, wherein the deed in question was ordered reformed by striking therefrom the words: "And also all and singular my real and personal property by me possessed and wheresoever situate." From this decision and decree an appeal was taken to the Supreme Court of the Territory of Hawaii. And on May 5, 1920, said decree of the Circuit Court was affirmed by the Supreme Court of the Territory of Hawaii and the plaintiffs in error have obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, assigning the following errors, to wit:

1. That the said Supreme Court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in said cause.

2. That the said Supreme Court erred in not reversing the said judgment of said Circuit Court and in deciding that judgment should not be rendered in favor of the said plaintiffs in error and dismissing the bill of defendant in error.

3. That the said Supreme Court erred in holding

that a certain deed dated June 10, 1905, offered in evidence at the trial of said cause and marked Exhibit "F," should be reformed on the grounds of fraud and deception.

4. That the said Supreme Court erred in alleging that Rebecca Houghtailing was deceived and defrauded by George F. De La Nux and that by reason of such deception and fraud signed said deed marked Exhibit "F."

5. That the said Supreme Court erred in sustaining the Trial Judge in not dismissing the complaint on the ground of laches of which Rebecca Houghtailing, plaintiff, was guilty.

6. That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the complaint did not contain the necessary and essential allegations to maintain the suit.

7. That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the complaint failed to allege a demand and the proof failed to show a demand, upon the minor defendants.

8. That the said Supreme Court erred in not rendering judgment ror the plaintiffs in error on the ground that the [384] Circuit Court of the First Judicial Circuit failed to find upon the issues raised in pleading, to wit, the statute of limitations.

## *ARGUMENT.*

THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED BY COMPLAINANT TO BASE ANY DECISION OR DECREE BY THE TRIAL JUDGE THAT THE DEED SHOULD BE REFORMED ON THE GROUND OF FRAUD OR DECEPTION. Assignments of error 1, 2, 3, 4; Trans., p. 403.

In an action brought to reform an instrument the burden of proof lies upon the persons seeking to reform the instrument, and especially in cases, as in the case at bar, where the matter has lain for fourteen years untouched and undisputed, the evidence should be so clear and overwhelming that there can be no question that it is the duty of the court to take affirmative action.

In Ruling Case Law, Vol. 23, at page 367, the sufficiency of evidence necessary to reform an instrument is discussed, and we take the liberty of quoting the entire paragraph here:

"Sufficiency of Evidence. It seems to be generally agreed that much stronger and clearer evidence is required than in an ordinary suit for damages; that the high remedy of reformation is never granted on a probability; and that a mere preponderance of evidence is not sufficient, although it has been in a few instances that a decree reforming an instrument will not be reversed if there is a preponderance of evidence in support of the findings. These strict requirements relate not only to the mistake, the mutuality thereof and the fraud alleged but also to the real agreement which is alleged to have been made. It has been held that when the equity is

claimed as a defense to an action on the instrument, the opposing testimony of the plaintiff to such defense is conclusive, unless contradicted by two witnesses or one witness and corroborating circumstances equivalent to a second witness. In attempting to lay down general rules as to the quantity, quality and kind of evidence which must be adduced the courts have employed many and varying expressions. It is said that the proof must be 'very clear'; 'clear and satisfactory'; 'entirely clear and most satisfactory'; 'the clearest and most satisfactory'; 'entirely exact and satisfactory'; 'clear and convincing'; 'clear, unequivocal and convincing'; 'clear, satisfactory and convincing'; 'so clear as to establish the fact beyond cavil'; 'beyond reasonable controversy'; 'free from doubt'; and 'of that clear and convincing character which leaves no reasonable doubt'; 'such as to leave no reasonable doubt upon the mind of the court'; 'so clear as to leave the fact without the shadow of a doubt'; 'as much to the satisfaction of the court as if admitted'; 'clear, convincing and indubitable'; 'clear, precise and indubitable'; 'clear and satisfactory and perhaps beyond a reasonable doubt'; 'clear, precise and indubitable and of such weight and directness as to establish the facts alleged beyond a reasonable doubt.' Although some of the decisions seem to have adopted the rule that fraud must be proved beyond a reasonable doubt, neither as to the proof of fraud nor of mistake is so strict a rule established. Nor can it be said that there is any rule which requires that the proof of the fraud or mistake, when denied, must be as satisfactory as if the mistake were admitted. Remarks of such character form no rule of law to direct courts in dispensing justice. All the foregoing expressions of the courts as to the degree or quality of proof required indicate a universal agreement that an instrument shall not be reformed on loose, contradictory and unsatisfactory evidence—a settled determination that when a mistake or fraud is alleged, it must be clearly established by satisfactory proofs.

Whatever the form used to express the degree of proof required, the only question is: Does it satisfy the mind of the court? When the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act on the conviction. Relief will not be denied merely because there is conflicting testimony, although it has been held that a direct conflict as to the mistake alleged is conclusive against a reformation. It has been doubted whether, as a general rule, a writing should be reformed on the unsupported testimony of the party asking its reformation. If the mistake is admitted by the other party, relief will be granted."

The reason of the rule requiring this high degree of proof is stated in *Patton vs. Potter,* 27 Ohio St. 84, where the court said:

"When the reformation of a written instrument is sought on the ground of mistake, the presumption is so strongly in favor of the instrument that the alleged mistake must be clearly made out by proofs entirely satisfactory, and nothing short of a clear and convincing state of facts showing the mistake will warrant the court to interfere with and reform the instrument. This principle rests upon the soundest reason and upon undisputed authority and if not adhered to by the courts or when plainly disregarded, if not enforced by reviewing courts, the security and safety reposed in deliberately written instruments will be frittered away and they will be left to all the uncertainties incident to the imperfections and 'slippery memory' of witnesses."

Instead of the trial judge acting on the presumption that the instrument was good, it seems that he has allowed the uncorroborated evidence of Mrs. Houghtailing that she was drunk and did not know what she was doing, to offset the clear and convinc-

ing evidence as related by many witnesses and coming from her own mouth, that she not only knew what she was doing, but that for some years after the execution of the deed did not wish or intend to change the same.

A short resume of the evidence in the case is hereby made for the purpose of showing that the overwhelming testimony showed that Mrs. Houghtailing was fully aware of what she had done; that there was no fraud and deception, and the pretense of drunkenness is now merely being used to enable her to undo what she then did, for the benefit of her drunken sons with whom she has since become reconciled and who are catering to her weaknesses:

Mrs. Houghtailing was only 49 years old when she signed the deed. (Trans., p. ~~29~~ 75.)

Told De La Nux not to record the deed as she did not want his brothers to know what she had done. (Trans., pp. 87, 109.)

Mrs. Houghtailing admits that she knew contents of deed either in 1911 or 1913. (Trans., pp. ~~99~~, 120.)

Admits she saw copy when deed was recorded in 1910. (Trans., p. 102.)

Admits she never spoke to George about the deed being wrong. (Trans., pp. 91, 120.)

Declares that she did not intend to give him all her property, but alleges there was no fraud or carelessness on her part. (Trans., p. 99.)

Admits that she supported both her sons, Charles and Henry, who, with their wives, were drunkards. (Trans., p. 103.)

Never had to support George or his family. (Trans., p. 103.)

Admits Henry was drinking all the time. (Trans., p. 103.)

Mollie Cockett, Mary Cullen and Agnes Robello testify Mrs. Houghtailing drunk most of the time. Mary Cullen testifies Henry and his wife drunk most of the time also. (Trans., pp. 139, 161.)

Agnes Robello admits Mrs. Houghtailing supported both her sons, Charles and Henry, and both were drunk most of the time. (Trans., pp. 166, 167.)

Henry De La Nux testifies he heard of deed made by his mother from Charles about 1916. Never spoke to George about it. Never worked except when he had to get more money for drink. (Trans., p. 174.) Mother always took care of him. (Trans., p. 181.)

Charles De La Nux admits mother told him about deed in 1908 or 1910. (Trans., p. 186.)

Never spoke to George about what his mother had said. (Trans., pp. 189, 190, 194.)

DEFENSE.

A. G. Correa, lawyer, testifies he was attorney for Mrs. Houghtailing for many years before signing of the deed. Drew deed under instructions of Mrs. Houghtailing. (Trans., p. 143.)

She was alone in his office and he took instructions from her only.

Deed was read and explained to her. (Trans., p. 145.)

She was perfectly sober. (Trans., p. 145.)

Geo. A. Richards, a friend of Mrs. Houghtailing, living on Kauai, testifies Henry told him that his mother had willed all her property to George and that she ought to have willed it to all of them and that Mrs. Houghtailing was present and admitted that she had deeded her property to George. This in 1916. Mrs. Houghtailing said, "Yes, I have willed the property to George." (Trans., p. 209.)

Mrs. Houghtailing at George's house later said in the presence of George, his wife, Mrs. Kaae and Makanai, that she had willed her property to George. (Trans., p. 211.)

Mrs. Edward C. Henry testifies she had lived with Mrs. Houghtailing for some time (seven or eight months). Said she had deeded her property to George and she was sorry, as she wanted to deed it to all of the boys. She was not intoxicated at the time. (Trans., p. 214.)

Remembers Henry, when drunk, quarreling with mother and asking why she gave all her property to George. She said, "Because you boys were mean to me." (Trans., p. 215.)

Mrs. Lucy Kauhane testifies that in 1899 she lived in Hawaii. Remembers Mrs. Houghtailing coming there to urge George to come down to Honolulu to live and she would support him. Said, "You are the favorite son; you need not work, mother has money to provide for us." (Trans., pp. 218, 219.)

Heard conversation at George's house before 1905 between George and Mrs. Houghtailing. Mrs. Hough-

tailing wanted to leave her property to George's eldest son. He said "No." After second child born she again urged it; he agreed. (Trans., p. 221.)

Mrs. Houghtailing gave as her reason that other sons abused her. (Trans., p. 221.)

Witness heard her say in 1917 she was glad she had given her property to George and his children. (Trans., p. 223.)

In 1902 or 1903, Mrs. Houghtailing wanted to give her property to George and his one child, and George said wait till the second child was born and then she said "Son, don't neglect it; don't let it go too long." George said he didn't want to grab it all. Mrs. Houghtailing replied other sons were not treating her right. (Trans., p. 224.)

Judge Whitney was Judge of Circuit Court in February, 1917. Mrs. Houghtailing consulted him. Had him draw up power of attorney for George to act as her attorney in fact. She was perfectly sober. Wanted Steere removed as guardian and George put in his place. (Trans., p. 232.)

Richard Westerbee and Charles Arnold, as employees of Honolulu Plantation, saw Mrs. Houghtailing many times living at George's house. She was always sober and seemed to love George's children. Jessie Makanai heard her say she liked George best; her other sons were stupid. (Trans., pp. 238, 239, 242, 245.)

Mrs. Kaae Haaeho knows Mrs. Houghtailing for many years; a sort of cousin of hers. She and her husband were visiting Mrs. Houghtailing in 1905—

about July. Mrs. Houghtailing told her she was going to try and break deed to George's children. Witness' husband said he would be witness for the children. Matter dropped. (Trans., p. 253.)

Witness asked Mrs. Houghtailing next day what she was talking about. Mrs. Houghtailing replied in the following conversation:

A. "Then you go out and get evidence for George." And he said: "Yes, for the truth, I am going to come on the stand for that boy," so that conversation was dropped right then and there. Finally, the next day my husband went down to Puuloa to search for another job. We were all alone at the house, we were around there talking over things, and I brought the conversation to her, and I said, "What about," and she got up, "about this deed to your 'Mopunas,' " "My big son," "Why, have you got another son?" "Yes, don't you know it, I have another keiki?" "No, I only know two, you always introduced me to the other two, you never told me you had another one." "Oh, yes, I have three, that is our keiki 'Haku' (speaking Hawaiian), called 'Lord of the family,' " so she started to tell me all about this, she had deeded to George's two sons all what she had, and in my question I says, "What about the other two keikis, Henry and Charley?" "Oh, she said, why, oh, you know what they are, they are mean and nasty to me; George is the best keiki, he treats me as a mother, and the other two know that, they don't treat me as a mother, abuse me as if I was nobody to them." "But I think you have done wrong, you

ought to give something to the other two boys." "Oh, plenty of time for that, I can fix that up some day or other, you never need mind meddling in my business." I said, "Of course not." And then the conversation was pau, she didn't bring it up until my husband died, then I saw an article in the papers that Steere was put under guardianship as a spendthrift and as a drunkard, so I went up early the next morning to her house. I saw her on the verandah, she greeted me, and I cried, and she said, "What are you crying for?" I said, "Oh I am, I feel hurt at heart." She says, "For what?" "The idea that you should go and allow yourself to be put on the spendthrift and a drunkard, a good family like yourself and mine be known in public that you are put under a spendthrift and drunkard." And she said, "That is nothing." I says, "Nothing." "Yes, nothing." I says, "How did you come to do this?" (Trans., p. 254.) "Oh, it is merely Mr. Steere put me up to this to break the deed to get back the property again." I says, "It is a very poor way," and she says, "So that I could get something for Henry and Charley." I says "There is lots of allowance you could make for the other two, but it is a disgrace to go into court and put yourself as a spendthrift, when I never knew Henry—put yourself as a spendthrift, and a drunkard, lose your own senses, you always a lady in your own house, a house that is always clean and tidy, a drunkard lives in shacks, that is what I call a drunkard," because I am talking to her, then she says, "Oh, don't be like that, people don't believe that

in court." "That will live in the court records from generation to generation." "Oh, no, it will be all over when the case is over." I said, "Nothing at all, no, whoever advised you advised you wrong." She says, "No," and I said, "It will be there from generation to generation." "Oh, that we will fix up bye and bye." And I said, "All right." (Trans., pp. 253-4-5.)

Mrs. Houghtailing told witness she made the deed of her own free will. (Trans., p. 255.)

Dan Holapu at George's house.—Mrs. Houghtailing told witness and his wife that she had given all her property to George's children because George would not take it. (Trans., p. 265.)

Mrs. Lahape De La Nux testifies that Mrs. Houghtailing wanted George to leave Hawaii and live with her. (Trans., p. 269.)

Mrs. Houghtailing wanted to deed all her property to George before 1905 and George wouldn't take it. (Trans., p. 270.)

Afterwards agreed to accept deed for children. (Trans., p. 272.)

Witness was present at lawyer's office, heard the deed read in Mrs. Houghtailing's presence and heard her say it was all right. (Trans., pp. 272, 273.)

Witness heard Mrs. Houghtailing (at interview when Larnach and Breckons came to their house to make demand) admit she deeded all her property to children. (Trans., p. 276.)

Mrs. Houghtailing came to their house after Breckons' interview and stated, "I know that I gave

you and my grandchildren this property and I want to stop this business. (Trans., pp. 277, 278.)

Stated she wanted George to be her guardian and wanted them to forgive her for starting suit. (Trans., p. 278.)

George De La Nux testifies his mother wanted him to come to Honolulu and live with her and that he would not have to work. (Trans., p. 296.)

Wanted to turn over all her property to her son. (Trans., p. 298.)

But that he would not agree on account of his brothers. Finally did agree that both children should get it. (Trans., p. 303.)

She kept sending for him to have the deed prepared, till finally he and his wife went with her to Correa's office. (Trans., p. 303.)

Had never seen Correa before in his life. (Trans., p. 303.)

Correa read deed to Mrs. Houghtailing. She said deed was all right. (Trans., p. 304.)

Mrs. Houghtailing then gave deed to witness and asked him not to record it. (Trans., p. 305.)

Did not record deed at his mother's request until 1910, when she wanted it changed, so he recorded it. (Trans., pp. 306-7.)

Mrs. Houghtailing wanted to make him her guardian. (Trans., p. 313.)

And took him to see Judge Whitney. (Trans., p. 318.)

It is respectfully submitted to the Court that from this evidence the trial judge should not only have

held that plaintiff did not sustain the burden of proof, but that it was clear that Mrs. Houghtailing at all times knew what she was doing in deeding her property to her grandsons.

In a suit to reform an instrument the proof of fraud or mistake must be indubitable, and the burden rests upon the person asserting the fraud or mistake to show its existence by testimony entirely plain and convincing beyond reasonable contradiction.

*N. W. Mutual,* etc., *v. Nelson,* 103 U. S. 549 (26 L. Ed. 438).

*Graves v. Boston,* etc., 6 U. S., 2 Cranch 444 (2 L. Ed. 332).

*Howland v. Naone,* 5 Haw. 308.

"Where a contract is sought to be avoided on the ground of surprise or mistake, the fact of such surprise or mistake must be either conceded or so clearly established as to be substantially without dispute."

*Voazie v. Williams,* 49 U. S.; 8 How. 157 (12 L. Ed. 1028).

THE TRIAL JUDGE ERRED IN NOT DISMISSING THE COMPLAINT ON THE GROUND OF LACHES ON THE PART OF PLAINTIFF. Assignments of error 5 and 8; Trans., p. 404.

The wording of the complaint was such that it was impossible to demur to the same on the ground of laches, as there was no allegation as to when Mrs. Houghtailing discovered the alleged fraud, and paragraph twelve of said complaint alleges:

"That thereafter, and upon discovery of the wrongful insertion in the said deed of the provision above referred to, and of the fraud and deceit which had been practiced upon her, the said Rebecca Houghtailing made demand upon the said George F. De La Nux that steps be taken to have the said deed corrected and reformed, in order that the same should carry out the intent of the said Rebecca Houghtailing, but that the said George F. De La Nux refused so to do. * * *" (Trans., pp. 306, 307.)

It would seem from this paragraph that immediately upon her ascertaining that she had deeded all her property to her grandsons she took steps to have the instrument revoked. The testimony, however, on the trial showed a far different state of affairs. Thus it appears that Mrs. Houghtailing executed the deed in question in 1905 and at no time did she take any steps in her own behalf to set it aside or modify its scope. Her failure to do so can not be excused on the basis of ignorance of the terms of the deed, because she admits that she knew full well its contents in 1911 or 1913 (Trans., pp. 99, 120) and there is very strong evidence that it was upon her sole and own instructions that the attorney prepared the conveyance (Trans., p. 143) in the first place. But even if we accept for the moment the hypothesis that the attorney did make a mistake (a presumption certainly contrary to the evidence, and contradicted by the attorney, George F. De La Nux and his wife) complete acquiescence of the terms of the deed on the part of Mrs. Houghtailing is shown. (See resume of evidence where she admits it to

George A. Richards, Mrs. Henry, Mrs. Kauhane, Mrs. Haaeho and Dan Holopu. (Trans., pp. 210-11.)

"The acquiescence in the written instrument may be implied from an unreasonable delay in applying for redress after getting notice or discovering a mistake," said the United States Supreme Court, in *Snell vs. Atlantic,* etc., 98 U. S. 85 (25 L. Ed. 52). See also *Jenks vs. Pawlowski,* 98 Mich. 110.

In the *Snell vs. Atlantic* case Supra, the Court goes on to say:

"It would be a serious defect in the jurisdiction in the courts of equity if they were without power to grant relief against fraud or mutual mistake in the execution of written instruments. Of course parol proof in all such cases is to be received with great caution, and where the mistake is denied, should never be made the foundation of a decree variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake. Hence, in *Graves v. Marine Insurance,* Supra, this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the complainant's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing."

The doctrine thus expressed by the United States Supreme Court has been closely followed in practically every state. In the case of *Stevens v. Patton,* 86 Ky. 379, 121 Pac. 498, the husband conveyed to his wife in fee all his property, reserving a life interest

to himself. Shortly afterward the fact was called to the attention of both spouses that a mistake had been made, the husband having intended to give his wife a life interest only,—the fee reserved to himself. But they lived for two years without taking steps to have the correction made, and the court held they thereby completely ratified the deed in its form.

So, even assuming that Mrs. Houghtailing did not know the contents of the deed at the time she executed it, her own admissions are in the record that she did know the full purport of the deed later on and never sought to change it. The fact that she learned of the "mistake" and allowed it to stand shows an implied ratification or acquiescence therein such as would bar her a few years later, through her guardian, in succeeding in this suit.

## PLEADINGS MUST AVER TIME FRAUD OR MISTAKE WAS DISCOVERED, AND GRANTOR WAS NOT GUILTY OF GROSS NEGLIGENCE.

A court of equity uniformly exercises its power to reform instruments with very great caution, and only does so when a proper case is made by the pleadings. The pleadings must show upon their face that the complainant is entitled to the relief sought, and if there has been a long delay in bringing the suit there must be allegations which negative the appearance of laches as well as gross negligence, and it is emphatically stated by no less authority than the United States Supreme Court that the pleadings must aver

the time when the fraud or mistake was discovered so that the defendant may be able to meet it:

"There must be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might have been made before."

*Stearns v. Page,* 7 How. 819 (12 L. Ed. 928).

"When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered; and this is the ground on which complainant asks relief. But in such a case the bill must be specific in stating the facts and circumstances which constitute the fraud; and also as to the time it was discovered. This is necessary to enable the defendants to meet the fraud and the alleged time of its discovery. In these respects the bill is defective, and the evidence is still more so."

*Moore v. Greene,* 19 How. 69, 15 U. S. (L. Ed.) 533.

Nowhere in the bill in the case at bar is any suggestion given as to when the alleged fraud was discovered by Mrs. Houghtailing; and far from being specific on this point, it passes it over entirely, simply saying in paragraph twelve: "That thereafter and upon the discovery of the wrongful insertion in said deed of the phrase above referred to and of the fraud and deceit which had been practiced upon her, the said Rebecca Houghtailing made demand upon the said George F. De La Nux that steps be taken to have the said deed corrected and reformed," etc., but not a word as to the time of the alleged discovery.

Had the bill set forth the date of the discovery of the alleged fraud, defendants might have availed themselves of the statute of limitations. Moreover, there is nothing in the bill to account for the long delay in bringing this action, the deed having been executed in 1905 and this case instituted in May, 1917.

In *Del Campo vs. Camarillo,* 154 Cal. 659, speaking on the same subject the Supreme Court of that state said:

"The remaining points in support of the non-suit apply equally in favor of the defendants. The deed of plaintiffs which is attacked was made seven years before this action was begun. * * * In seeking relief against frauds occurring so long ago, and in asking the court to cancel the contract and deed which in itself implies a settlement of the wrongs inflicted by those frauds, the plaintiffs are required to allege a clear case and to prove it by satisfactory and convincing evidence. They must clearly show that they did not discover the existence of the alleged fraud until a reasonable time before the action was begun; that they proceeded promptly upon such discovery and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown not merely by a bare statement of the conclusions as we have stated them but by a detailed statement of the facts and circumstances which caused the ignorance which prevented an earlier discovery and which constitutes the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the facts."

NO FINDINGS ON PLEA OF LACHES AND STATUTE OF LIMITATIONS. Assignments of error 5 and 8.

The defendant's answer in the court below contained a plea of the statute of limitations and laches. The court below failed to find upon that issue. The court found that the deed was signed by the complainant on the 10th day of June, 1905. In view of the fact that the defense of the statute of limitations was raised, the decision is contrary to law and contrary to the evidence, because there was no finding made upon one of the material issues of the case.

The lower court could not enter a decree reforming the deed without first making a finding that Rebecca Houghtailing, defendant in error, was not guilty of laches, but had prosecuted her action in seasonable time. The Supreme Court should have reversed the Circuit Court, as the Circuit Court could not render a decree which was not supported by its findings.

34 Cyc., Sub-division C, p. 997.

Section 2651 of the Revised Laws of Hawaii, 1915, provides as follows:

"Ten Years. No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action, first accrued."

Section 2633 of the Revised Laws provides as follows:

"Six Years. The following actions shall be commenced within six years next after the cause of such action accrued, and not after:

"5. Special actions on the case for criminal conversation, for libels, or for *any other injury to the persons or rights of any, except as otherwise provided.*"

25 Cyc. 1025 contains the following:

"By analogy to the statute of limitations at law barring an action for the recovery of lands after the lapse of a specified period from the accrual of the right of action, the lapse of the same period is usually a bar in equity to the recovery of an equitable estate, or for the enforcement of a right cognizable only in equity. Moreover where equity exercises concurrent jurisdiction, it will consider itself bound by, and will apply to, the statute of limitation as statutes, rather than by analogy; and where the statute operates on the right so that the cause of action is extinguished or barred, the bar prevents its enforcement in equity. The rule is laid down that in those cases where the main ground of action is fraud or mistake, whereby defendant has attained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet if plaintiff alleges facts which show, as matter of law, that he is entitled to the possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the statutory limitation barring such actions."

In *Louis et al. vs. Marshall et al.,* 8 Law. Ed. 197, the Supreme Court of the United States uses the following language:

"That a statute of limitations may be set up in defense in equity as well as at law, is a principle well settled. It is not controverted by the counsel for the complainants."

In *Farnan v. Crooks,* 26 Mass., 9 Pick. 212, fraud on the part of defendant does not prevent a statute of limitations from barring a suit in equity unless it be actual fraud which was concealed, and which the

party had no means of discovering till within six years before the filing of the bill.

In *Wilson v. Ivy,* 32 Miss. 233, the following appears:

"The statute of limitations commences running from the time of the commission of fraud, and not from the time when the injury occasioned by it to the plaintiff was established."

In *Hoffert v. Miller,* 86 Ky. 572, 5 S. W. 447, the following appears:

"A deed will not be set aside for fraud where it was executed more than 10 years before action was brought, during which time plaintiff was under age."

In *Francis v. Wallace,* 77 Iowa 373, 42 N. W. 323, the following appears:

"In an action to set aside a guardian's deed on the ground of fraud, the fraud is discovered within the meaning of the statute of limitations, when the deed was recorded." Sec. 2648, R. L.

When we examine the bill of complaint in the case at bar in the light of the doctrine expressed in the foregoing decision, the fact becomes very apparent that complainant has not made out a case by her bill such as would entitle her to the relief prayed for. There is nothing in the bill which shows any excuse for the years that elapsed from the making of the deed to the date when this action was commenced.

See also,

*Barkley v. Hibernia,* 21 Cal., A. 456.

*Jefferson v. Rust,* 128 N. W. 954, 149 Ia. 594.

NO DEMAND MADE ON THE DEFENDANT MINORS. Assignment of errors 1, 2, 3.

Before the within action could be instituted, a demand for reformation of the deed should have been made on the defendant minors. No such demand was alleged in the complaint, nor did the evidence show that any such demand was ever made. All of the authorities hold that a demand is a prerequisite and that suit cannot be instituted until the demand has been made.

34 Cyc., Sub-division B, p. 944.

In conclusion we respectfully submit that the trial court erred in the particulars herein mentioned, and that the decree should be reversed and reformation refused.

Dated, Honolulu, T. H., September 27, 1920.

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